

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ROBIN FARRIS; RECALL DALE WASHAM; a Washington political committee; and OLDFIELD & HELSDON, PLLC, a Washington professional limited liability company,

Plaintiffs,

DAVE SEABROOK, Chair; BARRY SEHLIN, Vice Chair; JENNIFER JOLY; and JIM CLEMENTS, in their official capacities as officers and members of the Washington State Public Disclosure Commission; and DOUG ELLIS in his official capacity as Interim Executive Director of the Washington State Public Disclosure Commission,

Defendants.

CASE NO. 11-5431 RJB

ORDER ON DEFENDANTS'
MOTION TO STRIKE UNTIMELY
MOTION FOR ATTORNEYS' FEES
AND COSTS

This matter comes before the Court on the Defendants' Motion to Strike Plaintiffs'

Untimely Motion for Attorneys' Fees and Costs. Dkt. 99. The Court has considered pleadings filed regarding the motion, the remaining record, and is fully advised.

I. FACTS

This case arises from Plaintiffs' attempts to recall an elected official in Pierce County, Washington and Washington's campaign finance laws. Dkt. 1. Plaintiffs challenge the constitutionality of two Washington statutes which limit campaign contributions. *Id.*

5 On July 15, 2011, Plaintiffs' motion for a preliminary injunction was granted. Dkt. 30.
6 Defendants appealed that Order. Dkt. 34. The Ninth Circuit Court of Appeals affirmed this
7 Court's decision and the mandate issued on April 19, 2012. Dkts. 48-49. On November 6, 2012,
8 Plaintiffs' motion for summary judgment was granted, and Defendants were permanently
9 enjoined from enforcing RCW § 42.17A.405(3) against them. Dkt. 89. A Notice of Appeal as to
10 that November 6, 2012 Order was filed on November 15, 2012. Dkt. 91 Judgment was entered
11 against Defendants on November 26, 2012. Dkt. 93. The facts and other procedural history are
12 in the July 15, 2011 Order (Dkt. 30, at 1-8) and November 6, 2012 Order (Dkt. 89, at 1-13) and
13 are adopted here.

14 On December 12, 2012, Plaintiffs filed a Motion for Attorneys' Fees and Costs (Dkt. 96),
15 seeking \$340,984, and a separate Motion for Costs (Dkt. 97) seeking \$805. Plaintiffs have
16 renoted the Motion for Attorneys' Fees and Costs (Dkt. 96) twice, and is currently noted for
17 consideration on February 8, 2012. Dkt. 103.

18 Defendants now move to strike Plaintiffs' Motion for Attorneys' Fees and Cost (Dkt. 96).
19 Dkt. 99. Defendants note that under Fed. R. Civ. P. 54(d) and Western District of Washington
20 Rule of Civil Procedure 54(d), Plaintiffs had 14 days to file the motion for attorneys' fees (they
21 had 21 days to file the motion for costs with the Clerk of the Court). *Id.* They argue that
22 Plaintiffs failed to comply with the rule (the motion was filed two days late) and urge the Court
23 to strike the motions. *Id.*

1 Plaintiffs respond, and argue that the motion was timely. Dkt. 102. Plaintiffs argue that
 2 the attorneys' fees are "costs," and so Rule 54(d)(1), governing costs assessed by the clerk's
 3 office, should govern. *Id.* If the attorneys' fees are not "costs" and Rule 54(d)(2) applies,
 4 Plaintiffs move the Court for relief under Fed. R. Civ. P. 6(b)(1)(B) for an extension of time to
 5 file their Motion for Attorneys' Fees and Costs (Dkt. 96). *Id.* They state that they realize now
 6 that they were consulting a 2013 West publication on the Local Rules that did not include the
 7 changes that became effective on December 1, 2012 and incorporated Fed. R. Civ. P. 54(d). *Id.*,
 8 at 3.

9 **II. DISCUSSION**

10 Although this case was on appeal when the motion for attorneys' fees was filed, district
 11 courts in this circuit retain jurisdiction to rule on motions for attorneys' fees after a notice of
 12 appeal is filed. *League of Women Voters of California v. F.C.C.*, 751 F.2d 986, 990 (9th Cir.
 13 1985)(*internal citations omitted*).

14 Pursuant to Fed. R. Civ. P. 54(d)(2)(B)(i), a motion for attorneys' fees "must be filed no later
 15 than 14 days after the entry of the judgment." Local Rule 54(d)(5), provides: "[a] motion for
 16 attorney's fees should not be included in the motion for costs to the clerk but should be directed
 17 to the court pursuant to Fed. R. Civ. P. 54(d), which sets forth requirements for the timing and
 18 contents of the motion."

19 Plaintiff's Motion for Attorneys' Fees (Dkt. 96) was filed on December 12, 2012, 16 days
 20 after entry of the judgment. Accordingly, it was untimely. Defendants' argument that attorneys'
 21 fees should be treated as "costs" for purposes of Rule 54(d)(1) in civil rights cases is unavailing.

22 Plaintiffs move for an extension of that deadline pursuant to Fed. R. Civ. P. 6(b)(1)(B).
 23 Under Rule 6(b)(1)(B), "when an act may or must be done within a specified time, the court
 24 may, for good cause, extend the time . . . on motion made after the time has expired if the party

1 failed to act because of excusable neglect.” To determine when a party has failed to act because
 2 of “excusable neglect,” courts should consider 1) the danger of prejudice to the opposing party,
 3 2) length of the delay, 3) the reason for the delay, and 4) whether the moving party acting in
 4 good faith. *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'Ship*, 507 U.S. 380, 388 (1993).

5 Defendants argue that Plaintiffs do not have a valid reason for the delay, although they do not
 6 make a showing on the remaining factors. Dkts. 99 and 105. Defendants argue that misreading
 7 local rules does not constitute “excusable neglect” and an extension of the deadline. *Id.* The
 8 Ninth Circuit has held that:

9 In *Kyle v. Campbell Soup Co.*, 28 F.3d 928 (9th Cir.1994), we considered
 10 “excusable neglect” in Fed. R. Civ. P. 6(e) in a case where a motion for attorneys’
 11 fees [in a civil rights case] was 2 days late and the district court had found
 12 excusable neglect because the plaintiff’s attorney had misinterpreted a local rule to
 13 incorporate a federal rule of procedure. We found the misinterpretation of the
 14 rules to be an inexcusable mistake of law and reversed the district court. We said:
 15 Although the Court in Pioneer recognized that “excusable neglect” is a flexible,
 16 equitable concept, the Court also reminded us that “inadherence, ignorance of the
 17 rules, or mistakes construing the rules do not usually constitute ‘excusable’
 18 neglect.”

19 *Pincay v. Andrews*, 351 F.3d 947, 950 (9th Cir. 2003)(citing *Kyle*, at 931). Likewise, in *Pincay*,
 20 the Ninth Circuit held that miscalculation of deadline set in the rules by law firm clerk did not
 21 constitute excusable neglect. *Id.*

22 In accord with *Kyle* and *Pincay*, Plaintiffs’ motion for an extension of the deadline to file
 23 their motion for attorneys’ fees pursuant to Fed. R. Civ. P. 6(b)(1)(B) (Dkt. 102) should be
 24 denied. As in *Kyle*, the motion for attorneys’ fees in this civil rights case was two days late.
 25 Counsel here, like the lawyer in *Kyle*, misinterpreted a local rule in relation to a federal rule of
 26 procedure. There is no showing that the Plaintiffs’ failure to follow the rules, because of
 27 “inadherence, ignorance of the rules, or mistakes construing the rules” should be considered
 28 excusable neglect. This is true even with the change in the rules a few weeks before Plaintiffs’

1 motion was due. Months before, the Court made it clear that the changes to the Local Rules
2 would go into effect on December 1, 2012. The most recent version of the Local Rules was on
3 the Court's website at the time. Plaintiffs should not be granted an extension of time to file their
4 motion for attorneys' fees and Defendants' Motion to Strike (Dkt. 99) should be granted.

5 **III. ORDER**

6 It is hereby **ORDERED** that:

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- 8 • Plaintiffs' Motion for Extension of Time (Dkt. 102) **IS DENIED**; and
- 9 • Defendants' Motion to Strike Plaintiffs' Untimely Motion for Attorneys' Fees and Costs
(Dkt. 99) **IS GRANTED**; and
- 10 • Plaintiffs' Motion for Attorneys' Fees (Dkt. 96) **IS STRICKEN**.

11 The Clerk is directed to send uncertified copies of this Order to all counsel of record and
12 to any party appearing *pro se* at said party's last known address.

13 Dated this 17th day of January, 2013.

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17 ROBERT J. BRYAN
18 United States District Judge
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